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No. 80-1863

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PEABODY COAL COMPANY,
Petitioner

v.

JAMES A. WATT, SECRETARY OF THE INTERIOR

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT NATIONAL WILDLIFE FEDERATION IN OPPOSITION

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June 5, 1981

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QUESTION PRESENTED

Whether the Surface Mining Act authorizes the Secretary of the Interior to promulgate regulations prescribing minimum information requirements for permit applications submitted to state regulatory agencies.

PARTIES BELOW

Respondent National Wildlife Federation* accepts the Petitioner's list of all parties to the proceeding when it was decided on the merits by the *en banc* court below.

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* The National Wildlife Federation has one subsidiary, Wildlife Publications, Inc., and one sister company, National Wildlife Federation Endowment, Inc. In addition, the Federation has 53 "affiliates." It is doubtful that these organizations are affiliates within the meaning of Rule 28, since the Federation does not have any ownership, interest, or control over these organizations. The "affiliates" are recognized in the Federation's Bylaws to be independent and autonomous. We list them here in an exercise of caution. The affiliates are situated in each of the states, as well as in Guam, the Virgin Islands, and Puerto Rico. Each bears the name "Wildlife Federation" preceded by the name of the State or Territory (*e.g.*, Alabama Wildlife Federation), except for the following: Alaska Sportsmen's Council; California Natural Resources Federation; Wildlife Federation of Delaware; Guam Science Teachers Association, Inc.; Conservation Council for Hawaii; Indiana Conservation Council, Inc., League of Kentucky Sportsmen, Inc.; Natural Resources Council of Maine; Michigan United Conservation Clubs; Minnesota Conservation Federation; Conservation Federation of Missouri; New Jersey Federation of Sportsmen's Clubs; New York State Conservation Council; League of Ohio Sportsmen; Pennsylvania Federation of Sportsmen's Clubs; Natural History Society of Puerto Rico, Inc.; Environmental Council of Rhode Island, Inc.; Tennessee Conservation League; Sportsmen's Clubs of Texas; Vermont Natural Resources Council; Virgin Islands Conservation Society, Inc., and Washington State Sportsmen's Council.

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OPINIONS BELOW—JURISDICTION—

STATUTES AND REGULATIONS INVOLVED

The opinions below have been properly identified by the Petitioner and Respondent National Wildlife Federation accepts the Petitioner's statement regarding jurisdiction and the recitals of the relevant statutes.

STATEMENT OF THE CASE

The issue presented for review by this Court was raised by Petitioner before the U.S. District Court for the District of Columbia pursuant to section 526(a)(1)

of the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 445, 30 U.S.C. § 1201, *et seq.* The issue was decided, on motion for preliminary injunction, adversely to Petitioner. The U.S. Court of Appeals for the District of Columbia Circuit affirmed the denial of the Motion for Preliminary Injunction. The U.S. District Court then decided the issue on the merits against Petitioner. A separate appeal, pursuant to Rule 54(b), Fed. R. Civ. P., was then taken to the U.S. Court of Appeals. The panel decision of the Court of Appeals issued on July 10, 1980, reversed the decision of the District Court. The full Court of Appeals, however, acting on a suggestion for Rehearing *en banc*, vacated the panel decision, and on April 1, 1981, affirmed the decision of the District Court.

The *en banc* court cited two separate statutory bases for upholding the Secretary's authority to promulgate regulations establishing minimum information requirements for permit applications. The first, section 201 (c)(2), authorizes the Secretary to "promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act." The second, section 501(b), authorizes the Secretary to promulgate regulations "establishing procedures and requirements for preparation, submission, and approval of state programs, and development and implementation of Federal programs. . . ."

On May 6, 1981, Petitioner filed a Petition for Writ of Certiorari with this Court.

SUMMARY OF ARGUMENT

The Court should deny the Petition for Writ of Certiorari because the Court of Appeals for the District of Columbia's *en banc* decision is correct and the issue is a narrow one of statutory construction.

Sections 201(c)(2) and 501(b) of the Surface Mining Control and Reclamation Act of 1977 authorize the Secretary of the Interior to promulgate regulations requiring minimum information for surface mining permit applications.

ARGUMENT

REASONS FOR DENYING THE WRIT

A. The En Banc Decision Is Correct.

The *en banc* decision of the U.S. Court of Appeals upholding the authority of the Secretary of the Interior to promulgate regulations prescribing minimum information for surface mining permit applications is correct and does not warrant review by this Court.

As noted in the statement of the case, the *en banc* Court of Appeals, and this Respondent, rely on two statutory provisions as authority for the Secretary to promulgate regulations requiring additional data for surface mining permit applications. Respondent will deal with each in turn.

1. § 201(c)(2)—Section 201(c)(2) authorizes the Secretary to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act." On its face, § 201(c)(2) gives the Secretary general authority to promulgate regulations which he deems necessary to achieve an important provision of the Act. The Petitioner, however, contends that § 201(c)(2) does not mean what it says. Rather, it argues that the provision should be narrowly construed to limit the Secretary to promulgating rules on "routine housekeeping" matters. Petitioner makes a rather strained argument to support this narrow view. It argues that because the Act contains a number of specific grants of rulemaking authority, Congress did not intend § 201(c)(2) to authorize the Secretary to

promulgate substantive regulations that go beyond the specific grants of rulemaking authority.

There are several fatal flaws in this position. Respondent will cite two of the most obvious. First, there is no legislative history which indicates that Congress intended that § 201(c)(2) be anything other than what it appears to be—a general grant of rulemaking authority. Conversely, there is no legislative history that Congress meant the specific grants of rulemaking authority to undercut or limit the general grant of authority set out in § 201(c)(2).[1]

Second, as the *en banc* court noted, such a restrictive interpretation of a general grant of rulemaking authority in a statute where specific grants of rulemaking authority exist is squarely at odds with a number of recent cases decided by this Court. *See, e.g., E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 132 (1977); *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356 (1973). Petitioner's argument would lead to the conclusion that § 201(c)(2) is excess verbiage.

2. § 501(b)—Section 501(b) authorizes the Secretary to establish procedures and requirements for preparation, submission, *and approval* of state programs." (Emphasis added.) The *en banc* Court of Appeals correctly interpreted this provision to grant the Secretary substantive powers to establish standards for state programs.

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[1] The plain language of the Act indicates that Congress intended that the Secretary could set minimum information standards which go beyond those specifically enumerated in the Act. Section 507(b), which establishes permit application requirements, states that "The permit application shall . . . contain, *among other things*, . . ." (emphasis added). The phrase "among other things" assumes that "other things," i.e., more information, may be required. Congress quite clearly never intended the list of information requirements set out in § 507(b) to be exclusive. Rather, Congress intended the information requirements in § 507(b) to be the bedrock below which neither the Secretary nor a state regulatory agency could fall in requiring information.

The Petitioner concedes that the Secretary can disapprove a state program if it does not contain adequate permit information requirements even though those requirements may go beyond those enumerated in the Act. At the same time, Petitioner argues that the Secretary is powerless to promulgate regulations indicating what permit information requirements must be included to prevent rejection of a state program. In short, Petitioner would require the Secretary to proceed on a case-by-case basis. Clearly, this would be administratively unworkable. Moreover, in similar situations this Court has repeatedly upheld the authority of an agency to proceed by regulation, as opposed to case-by-case adjudication. *See, e.g., E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 126-35 (1977); *Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 619-21 (1973).

B. The Issue Is A Narrow One.

In its Petition, Petitioner characterizes this case as one of first importance. It argues that the Court of Appeals decision, if left standing, would place considerable economic and administrative burdens on the companies involved. Petitioner further contends that the case raises fundamental issues of state-federal relationships and that it involves political rather than technical issues. Such is not the case. The question involved is an extremely narrow issue of statutory construction—whether sections 201(c)(2) or 501(b) of the Surface Mining Act authorize the Secretary of the Interior to promulgate regulations establishing minimum requirements for permit applications.

The heart of Petitioner's argument is that if the Secretary is permitted to set minimum information requirements for surface mining permits, there would be no bar to keep the Secretary "from invading all other state prerogatives," and from placing overwhelming administrative and economic burdens on operators. (Pet. 10, 11,

13.) The short response to this contention is that the Petitioner or other affected parties remain free to challenge any improper invasion of state prerogative as an abuse of the Secretary's discretion. Indeed, Petitioner itself has not shied away from such challenges in the past. [App. A, 6a, Fn. 4.] Respondent would emphasize that the only issue decided by the U.S. Court of Appeals was the authority of the Secretary to promulgate *any* permitting regulations. The wisdom of any particular permitting requirement was not before the Court of Appeals and is not before this Court.

In a related argument, the Petitioner contends that the Secretary of the Interior should not be permitted to require minimum information requirements since primary responsibility for regulation under the Surface Mining Act rests with the states. (Pet. 11-13, 17-18, 19.) This argument overlooks the fact that the Federal Government has the responsibility under the Act to establish nationwide minimum standards and to provide oversight. §§ 101(g), 503, 517. It is this responsibility that requires establishment of minimum information requirements for permit applicants. In addition, minimum information requirements enable citizens and citizen groups such as Respondent to effectively exercise their rights under the Surface Mining Act. §§ 513(c), 514.

Finally, Petitioner's petition contains the puzzling contention that the courts should not defer to the judgment of the Secretary of the Interior in this case since the issue involved is political rather than technical and was made by a prior Secretary of the Interior. (Pet. 13.) The issue raised in the instant case involves a narrow and technical statutory implementation judgment by the agency responsible for administering the Act, and is therefore entitled to deference under the established principles of administrative law. *See, e.g., Miller* v. *Youakim*, 440 U.S. 125, 145, n. 25 (1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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